Supreme Court, U.S.
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No. 91-830

IN THE

Supreme Court of The United States

OCTOBER TERM, 1991

AVALA OF TEXAS, INC., d/b/a THE AVALA GROUP
AND d/b/a PLYMOUTH PARK SHOPPING CENTER

AND

INTERSHOP REAL ESTATE SERVICES, INC.,
f/k/a HFA MANAGEMENT USA CO.,

Petitioners

V.

THE HONORABLE DAVID WEST
JUDGE OF THE 269TH DISTRICT COURT
HARRIS COUNTY, TEXAS

AND

THE HONORABLE COURT OF APPEALS-
FOR THE FIRST DISTRICT OF TEXAS,

Respondents

RESPONDENTS' BRIEF IN OPPOSITION

JIMMY WILLIAMSON, P.C.
300 Fannin, Suite 300
Houston, Texas 77002
(713) 223-3330
Attorney Ad Litem For
Alicia Nicole Garcia

PERRY O. BARBER JR.
Counsel of Record

RONALD D. KRIST
KEVIN D. KRIST
DAVID A. SLAUGHTER
Krist, Gunn, Weller, Neumann
& Morrison, L.L.P.
17555 El Camino Real
Houston, Texas 77058-3097
(713) 283-8500
Counsel for Respondents

QUESTION PRESENTED

Does the due process clause of the Fourteenth Amendment require that orders of Texas trial courts granting new trials be reviewable by writ of mandamus?

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No. 91-830

In The

Supreme Court of The United States

October Term, 1991

Avala of Texas, Inc., d/b/a The Avala Group
and d/b/a Plymouth Park Shopping Center

and

Intershop Real Estate Services, Inc.,
f/k/a HFA Management USA Co.,

Petitioners

v.

The Honorable David West
Judge of The 269th District Court
Harris County, Texas

and

The Honorable Court of Appeals
For The First District of Texas,

Respondents

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT

Respondents (Plaintiffs below and the real parties in interest herein) filed suit against Petitioners (the owner and manager of the Plymouth Park Shopping Center) to recover damages for the death of Patricia Wilson Garcia, who was murdered as she was attempting to buy stamps at a self-service postal island located in the parking lot of the center (Petition 3). After a jury trial resulted in a verdict favorable to Petitioners (App. G to Petition), the trial court entered judgment on the verdict in Petitioners'

favor (App. F to Petition). On Respondents' Motion (App. I to Petition), the trial court entered an order granting a new trial (App. D to Petition). Although the order specified no reason, the trial court indicated during the hearing on Petitioners' Motion for Reconsideration that the new trial was granted in the interest of justice (App. J to Petition at 3).

After unsuccessful attempts in the Court of Appeals (App. C to Petition) and the Supreme Court of Texas (App. A, B to Petition) to review the new trial order by way of mandamus, Petitioners sought certiorari in this Court.

REASONS FOR DENYING CERTIORARI

1. Petitioners failed to raise the equal protection claim now being asserted in this Court in the Texas courts. Petitioners' equal protection claim in the Texas Court of Appeals (App. K to Petition at 19) and in the Supreme Court of Texas (App. N to Petition at 20) was an assertion, unsupported by authority, that the "... exemption of new trial orders from any review contravenes the due process and equal protection clauses of the United States and Texas constitutions." The equal protection argument now being advanced (Petition 18-19) — that Texas, having recognized two exceptions to the reviewability of new trial orders by way of mandamus, must review all new trial orders by way of mandamus — was never presented to the Texas courts. Because Petitioners' equal protection claim is being presented for the first time in this Court, review is precluded. *Beck* v. *Washington*, 369 U.S. 541 (1962).[1]

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[1] Moreover, the claim lacks merit. It amounts to no more than a contention that because the writ issues in one case and is denied in another, the party who is unable to secure mandamus relief has been unconstitutionally discriminated against. *Compare* Mallard v. United States Dist. Court, 490 U.S. 296 (1989) *with* Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33 (1980).

2. The judgment of the Supreme Court of Texas rests on an adequate and independent state ground within the meaning of this Court's decision in *Herb* v. *Pitcairn,* 324 U.S. 117, 125-26 (1945). The Texas decisions make clear that mandamus will lie only to correct an abuse of discretion or a violation of clear duty *and* when there is no other adequate remedy at law.[2] Given the factually intensive nature of Petitioners' argument (App. N to Petition at 8-11), it is probable that the Supreme Court of Texas denied leave to file solely because under the Texas decisions mandamus was not available. It certainly cannot be said that the "necessary effect" of denial was to reject Petitioners' constitutional challenge, as Petitioners contend (Petition 9 n.6).[3]

3. Petitioners' narrow claim that the due process clause of the Fourteenth Amendment requires the Texas courts to review orders granting new trials by way of mandamus is a classic case of a "federal question" so absolutely devoid of merit as to be frivolous. *Cf. Equitable Life Assurance Society* v. *Brown,* 187 U.S. 308 (1902). Recognizing that it has no authority for this proposition and that the analogous controlling authority is to the contrary,[4] Petitioners have broadened their argument to one asserting that the Texas scheme is constitutionally defective because orders granting a new trial are effectively unreviewable (Petition 10-18). There are two problems with this approach.

First, Petitioners cite no case, and Respondents are aware of none, holding that the due process clause of the Fourteenth Amendment requires that the states provide appellate review of

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[2] *See, e.g.,* State v. Walker, 679 S.W.2d 484, 485 (Tex. 1984).

[3] The absence of any opinions from the Texas courts distinguishes this case from New York *ex rel.* Bryan v. Zimmerman, 278 U.S. 63 (1928).

[4] Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33 (1980) (mandamus not available to review action of a federal trial court granting a new trial).

orders granting new trials at some stage.[5] Second, this broader issue is not presented by the action of the Texas courts in denying mandamus. Should Petitioners wish to assert this broader contention, the proper time to do so is on appeal following the second trial.[6] Although that argument is not supported by the prior decisions,[7] at least the question would be properly before the Court.

4. The underlying merits of the case[8] turn solely on an analysis of the factual sufficiency of the evidence to support the verdict. As this Court has observed, it does ". . . not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

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[5] Although the *Daiflon* result is bottomed in part on the availability of review on appeal from the judgment following a second trial, the case by no means stands for the proposition that the Fifth Amendment guarantees a review at some stage of federal court orders granting new trials.

[6] The Petitioners' quarrel is with the decision in Cummins v. Paisan Const. Co., 682 S.W.2d 235, 236 (Tex. 1984) (order granting new trial not reviewable on appeal after second trial), not with the unavailability of mandamus.

[7] *Cf.* Martinez v. California, 444 U.S. 277, 282 (1980) (state interest in fashioning its own rules of substantive tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual from state action that is wholly arbitrary or irrational).

[8] *See* Question 3 (Petition ii) and Petitioners' requested relief (Petition 21).

CONCLUSION

For these reasons the Petition for Writ of Certiorari should be denied.

JIMMY WILLIAMSON, P.C.
300 Fannin, Suite 300
Houston, Texas 77002
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